Horizon Group of New England *and* Southern New Jersey Laborers District Council *and* Laborers Local Union No. 1153. Cases 22–CA–26318 and 22–CA–26441

July 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 21, 2005, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as discussed below, and to adopt the recommended Order as modified.[1]

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to apply to jobsites in Trenton and Newark, New Jersey, the terms and conditions of a collective-bargaining agreement that the Respondent entered into by signing a short-form agreement at its Burlington, New Jersey jobsite. The Respondent argues, inter alia, that it was not obligated to adhere to the collective-bargaining agreement because its signature on the short-form agreement was procured by "fraud in the execution."[2] For the following reasons, we agree with the judge that the Respondent failed to establish the factual prerequisites of that defense. We therefore find it unnecessary to pass on the judge's finding that the parol evidence rule precludes consideration of the evidence the Respondent relies on in support of its defense.

Facts

The Respondent performs commercial construction. In July 2003, the Respondent successfully bid on a project involving renovation work on three schools in Burlington, New Jersey. The project was covered by a Project Labor Agreement (PLA) that required the contractor to use labor referred by various unions, and to be bound by various collective-bargaining agreements for work performed on the project.

The Respondent began work on the Burlington project on about July 7, 2003, performing demolition work using its own employees. The Respondent performed approximately 10 percent of the work with its own employees, and the remainder of the work was subcontracted out by the Respondent to various contractors whose employees were also subject to the PLA. When the work began, the Respondent did not have a collective-bargaining agreement with any labor organization, and its 15–20 employees were not represented by any union.

On August 5, 2003, Carl Styles, a business agent for the Southern New Jersey Laborers District Council, along with a business agent of another union, visited the Burlington jobsite and met with Doug Robbins, the Respondent's project manager, in the jobsite trailer. Styles introduced himself to Robbins and informed Robbins that Styles had noticed that the Respondent was performing demolition work, which was within the jurisdiction of the Laborers Union. Styles requested that the Respondent put some of his men to work, and Robbins replied that he was more than happy to do so since the Respondent was bound by the PLA. Styles handed Robbins a copy of a document entitled "Short Form Agreement," plus a copy of the 2002–2007 collective-bargaining agreement between the New Jersey Laborers District Councils and the Building, Site and General Construction Contractors and Employers. Robbins asked Styles what those documents were for, and Styles answered that, in order for the Respondent "to get men to work," Robbins needed to sign the short-form agreement. Robbins read the short-form agreement and asked if it was part of the project labor agreement. Styles answered that "it was part of the Project Labor Agreement." The short-form agreement reads as follows:

> The undersigned Employer, desiring to employ laborers from the New Jersey Building Laborer Local Unions and District Councils affiliated with the Laborers' International Union of North America, hereinafter the "Union," and being further desirous of building, developing and maintaining a harmonious working relationship between the undersigned Employer and the said Unions in which the rights of both parties are recognized and respected, and the work accomplished with the efficiency, economy and quality that is necessary in order to expand the work opportunities of both parties, and the Unions desiring to fulfill the undersigned Employer's requirements for construction craft laborers,

[1] We shall modify the judge's recommended Order and notice to conform to the Board's standard remedial language.

[2] The Respondent does not argue that its signature was procured through "fraud in the inducement." Accordingly, we do not address the viability of that defense, and do not pass on the judge's finding that "fraud in the inducement" was not present here.

> the undersigned Employer and Unions hereby agree to be bound by the terms and conditions as set forth in the 2002–[20]07 Building, Site and General Construction Agreement, which Agreement is incorporated herein as if set forth in full.

Styles then stated that if the Respondent did not sign the agreement, it would not receive any referrals from the Union, and the Union would cause "trouble" for the Respondent with the school district and the New Jersey School Construction Company (NJSCC), the source of funds for the renovation project. Robbins told Styles to leave the documents and that Robbins would get back to him. Styles then put the package on the table and left the trailer.[3]

Afterwards, Robbins consulted with his brother, Dean Robbins, the Respondent's co-owner. Dean Robbins decided that the Respondent should sign it to avoid the threat that the Union would cause "trouble" and would not otherwise refer any laborers to the Burlington project.

The next day, August 6, 2003, the Respondent faxed a signed copy of the short-form agreement to the Union. The Agreement was signed by Doug Robbins. Union Business Agent Styles then signed a copy of the agreement.

The Laborers District Councils' agreement includes the following recognition clause:

> *1.10 Union Recognition.* The Employer recognizes that the Building and Construction District Councils and Local Unions bound hereby represent a majority of employees of the Employer doing laborer's work and shall be the sole bargaining representatives with the Employer for all employees employed by the Employer engaged in all work of any description set forth under Article II, Section 2.10, Work Jurisdiction, below. The District Councils and Laborer Local Unions bound hereby are: Northern New Jersey Building Laborers District Council (Locals 592, 325 and 1153); Central New Jersey Building Laborers District Council (Locals 394, 593 and 1030) and the Southern New Jersey Building Laborers District Council (Locals 222, 415 and 595).

Article II, "Work and Territorial Jurisdiction" Section 2.30 territorial jurisdiction, reads in part:

> This Agreement is effective and binding on all jobs in the State of New Jersey upon the execution of the same by the Employer and any building and construction laborer local union bound hereby. . . .

Article I, Section 1.30, entitled "Scope of Agreement," reads:

> The relationship of the parties is fully and exclusively set forth by this Agreement and by no other means, oral or written.

Finally, the signature page of the agreement provides in bold face:

> **Note: This Agreement may not be limited to a Job Only Agreement without the written approval of the District Council Business Manager.**

From around August 7, 2003 to September 2003, the Respondent employed laborers referred by the Union at the Burlington jobsite. On September 12, 2003, Doug Robbins faxed the following letter to the Union:

> Subject: Terminating labor agreement.
>
> Horizon Group would like to thank you for supplying us with manpower for the Burlington City Schools-NJSCC project. It was most helpful in getting the work completed on time. Due to the fact we won't need any more laborers and [sic] hereby terminate contract as per Article XXIII: Agreement & Termination 23.10.
>
> Once again thank you for your cooperation and help on this project.

The Union did not respond to the Respondent's termination letter, which was untimely under the agreement's termination clause.

In January 2004, the Respondent began performing work at the Columbus School in Trenton, New Jersey, a project not covered by the PLA. The Union learned of the work and demanded that the Respondent comply with the Laborers District Councils' collective-bargaining agreement at that site. The Union took the position that the short-form agreement signed by the Respondent committed the Respondent to honoring the collective-bargaining agreement throughout the State of New Jersey.

In June 2004, the Respondent received another contract to perform work in New Jersey, at the First Avenue School in Newark. The Union demanded arbitration under the collective-bargaining agreement, claiming that the Respondent had violated the agreement at the Newark jobsite by performing work "nonunion" and subcontracting work to a nonsignatory contractor. Subsequently, the Union filed the instant unfair labor practice charges.

[3] The judge discredited Robbins' testimony that Styles told him that the short-form agreement would be for one project only.

Judge's Decision

The judge rejected the Respondent's defense that its signature on the short-form agreement was procured by "fraud in the execution," and therefore that it was not obligated to adhere to the Laborers District Councils' collective-bargaining agreement. The judge first found that although Styles misrepresented to Doug Robbins that the short-form agreement was part of the project labor agreement, when it was not, the short-form agreement was nevertheless unambiguous and could not now be modified. The judge relied on Board cases stating that where contractual provisions are unambiguous, parol evidence is inadmissible to vary the terms of the agreement. *Quality Building Contractors*, 342 NLRB 429, 430–431 (2004); *America Piles*, 333 NLRB 1118, 1119 (2001); *NDK Corp*., 278 NLRB 1035 (1986).

The judge went on to find that "fraud in the execution" did not occur here. He noted that "fraud in the execution" requires the moving party to prove that it was in fact misled about what was being signed, and that the party relied on that misrepresentation when signing the document. The judge found that there was no reliance here. He observed that the Respondent did not sign the short-form agreement because of any misrepresentation by the Union, but because the Union threatened not to refer it any laborers and to make "trouble" for the Respondent if it did not sign. The judge concluded that the Respondent "knew full well" when it signed the short-form agreement that it would be obligated to apply the contract to all jobs in New Jersey.[4]

Analysis

We agree with the judge that no "fraud in the execution" occurred in this case. As set forth in *Iron Workers' Local 25 Pension Fund v. Nyehold Steel, Inc.*, 976 F.Supp. 683, 688–689 (E.D. Mich. 1997) (footnotes omitted), cited by the Respondent:

> Fraud in the execution arises when "a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract." *Restatement (Second) of Contracts* § 163 (1981). See also *Rozay's Transfer*, 791 F.2d at 774 (citing *Uniform Commercial Code* § 3-305(2)(c) and *Restatement (Second) of Contracts* § 163 (1981) . . . *Operating Eng'rs*., 737 F.2d at 1504 ("he who signs a document reasonably believing it is something quite different than it is cannot be bound to the terms of the document"). In other words, fraud in the execution (a.k.a. "fraud in factum") occurs when a misrepresentation is made which induces a party [to] believe that he is not assenting to any contract or that he is assenting to a contract entirely different from the proposed contract. *Restatement (Second) of Contracts* § 163, cmt. a (1981).

In other words, fraud in the execution "induces a party to believe the nature of his act is something entirely different than it actually is." Id. at 689 fn. 11. "'Fraud in the execution' arises when a party executes an agreement 'with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms.'" *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 774 (9th Cir. 1986). "To maintain a defense of fraud in the execution, [an employer] would have to establish 'excusable ignorance of the contents of the writing signed.'" Id. See also, *Iron Workers' Local 25 Pension Fund v. Allied Fence and Security Systems*, 922 F.Supp. 1250, 1259 (E.D. Mich. 1996) ("excusable ignorance" standard not satisfied solely by virtue of union misrepresentation where employer had subsequent opportunity to review the agreement before signing it); *Positive Electrical Enterprises*, 345 NLRB No. 67, slip op. at 8 (2005) (no fraud in the execution found where employer had the opportunity to read the one-page letters of assent; judge discredited assertion that employer had no understanding of what he was signing); *Laborers' Pension Fund v. A & C Environmental, Inc.*, 301 F.3d 768, 780–781 (7th Cir. 2002) ("fraud in the execution" defense not established where employer's claimed "ignorance of the nature of the contract was not excusable.").

We find that fraud in the execution has not been established for three reasons. First, the Respondent has not shown that in deciding to sign the short-form agreement, it relied on the Union's misrepresentation that the short-form agreement was part of the PLA. Rather, as found by the judge, the Respondent decided to sign the document to avoid the "trouble" and cutoff of referrals threatened by the Union.

[4] The judge relied on testimony by the Respondent's co-owner, Michael Dawson, that Dean Robbins told him that Doug Robbins had signed the agreement "under coercion or fear that he couldn't do the project," because Styles told Doug Robbins "that if he didn't sign the agreement [Styles] would not bring the Laborers to the project and we would be in default of the PLA." Dawson did not testify that the Respondent signed because it believed the document applied only to the Burlington project. The judge also relied on the Respondent's September 2003 attempt to terminate the collective-bargaining agreement. The judge reasoned that if the Respondent had truly believed that it had signed only a one-project agreement, it would not have needed to terminate the agreement when that project ended. Finally, the judge relied on the failure of Dean Robbins to testify. The judge concluded that the Respondent signed the agreement in order not to jeopardize the Burlington project.

The dissent engages in speculation when it concludes that the Respondent relied on the misrepresentation because "there was no reason for Styles to misrepresent the nature of the Short Form Agreement other than to get Doug Robbins to sign it." Unlike the dissent, our finding that the Respondent did not rely on the misrepresentation in signing the agreement is supported by record evidence. Specifically, we rely, as did the judge, on the testimony of the Respondent's co-owner, Michael Dawson, who stated that Dean Robbins told him that Doug Robbins had signed the agreement "under coercion or fear that he couldn't do the project," because Styles had told Doug Robbins "that if he didn't sign the agreement [Styles] would not bring the Laborers to the project." Robbins did not tell Dawson that the Respondent signed because it believed the document applied only to the Burlington project. Thus, the Respondent signed the agreement for reasons relating to a fear that it would not be able to fulfill the requirements of the PLA without union labor.

The dissent agrees that the threat of a work stoppage was a motivating factor in the Respondent's signing the agreement. However, it goes on to suggest that because a reasonable employer "may decide" that signing a "much broader agreement" is "too high a price to pay" to avoid a work stoppage, the Respondent here must have relied on the misrepresentation that the agreement was part of the PLA, because otherwise it would not have signed the agreement. That argument, however, is sheer speculation, unsupported by record evidence.

Second, the Respondent has not shown that, at the time it signed the short-form agreement it did not know the character or essential terms of that agreement, i.e., that it was not limited to the Burlington project. To the contrary, we find, in agreement with the judge, that the Respondent did know. Because, as the judge found, the Respondent knew "full well" that it was obligating itself to a statewide agreement, the Respondent was not induced by the Union's misrepresentation to believe that it was "assenting to a contract entirely different from the proposed contract." Restatement (Second) of Contracts § 163, cmt. a (1981).[5]

Our finding that the Respondent "knew" that it was binding itself to a state-wide agreement is supported by the record. The language of the document signed by the Respondent makes it clear that it was not a project-only agreement. Thus, the short-form agreement expressly incorporates the full Laborers District Councils' collective-bargaining agreement, which clearly states that it applies to all jobsites in New Jersey and that it cannot be limited to a job-only agreement without the *written* approval of the District Council business manager. The clarity of the documents themselves precludes a finding that the Respondent did not know or have the reasonable opportunity to know the character or essential terms of the proposed contract.[6]

In addition to the express language of the documents, we observe that in September 2003, the Respondent attempted to terminate the collective-bargaining agreement. If the Respondent had not understood that the document it had signed applied to future New Jersey jobsites, it would not have made that attempt to terminate the agreement when the Burlington project ended.[7]

Accordingly, we find that the documents themselves, as well as the Respondent's later conduct with respect to the attempted termination of the contract, demonstrate that the Respondent knew that the contract was not limited to the Burlington project. We therefore conclude that the Respondent has not met its burden of showing that it did not know of the character or essential terms of the proposed contract at the time it signed the agreement.[8]

Third, *even if* the Respondent did not fully understand the implications of the short-form agreement that it was

[5] In agreeing with the judge's finding that the Respondent was not induced by the Union's misrepresentation to sign the agreement, we find it unnecessary to rely on the adverse inference drawn by the judge based on the failure of Dean Robbins to testify in this proceeding.

[6] Unlike in *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984), cited by the dissent, Doug Robbins was provided with copies of both the short-form agreement and the statewide collective-bargaining agreement before Robbins signed the short-form agreement. Under these circumstances, Robbins could not "reasonably and justifiably" think that the documents bound the Respondent to apply the collective-bargaining agreement to the Burlington project only. Id. at 1504–1505 fn. 2. The dissent minimizes the importance of this distinction, instead emphasizing the similarity of the misrepresentations themselves. However, the importance of the distinction lies in the element of knowledge. In *Gilliam*, a finding that the employer did not know the nature of the document it was signing was plausible in light of the fact that it did not receive a copy of those documents. Here, however, the Respondent had copies of the documents before it signed the short-form agreement and therefore it cannot reasonably argue that it failed to know the character or essential terms of the proposed contract.

[7] The dissent observes that the attempted termination came later, and asserts that it tells us nothing about what the Respondent knew when it executed the agreement. Although the attempted termination does not, in and of itself, establish that the Respondent knew the extent of its obligation when it signed the agreement, it is consistent with that knowledge. Moreover, it also shows that the meaning of the documents was clear when the Respondent chose to read them.

[8] In stating that we "miss the point" by relying on the language of the contract itself to show knowledge, the dissent asserts that the "issue is whether fraud was used to obtain a signature on the contract." The issue, however, is not whether a misrepresentation was made in the context of obtaining a signature, but rather whether the Respondent has met its burden of establishing the elements of "fraud in the execution." We are persuaded that it has not.

signing, a "fraud in the execution" defense would still fail because the Respondent has not shown that it did not have a "reasonable opportunity to obtain knowledge of [the document's] character or its essential terms." *Rozay's Transfer*, 791 F.2d at 774. As set forth above, the 1-page short-form agreement, which Doug Robbins admits he read, expressly incorporates the full Laborers District Councils' collective-bargaining agreement. The judge found that the Union's representative gave Doug Robbins a copy of both the short-form agreement and the full collective-bargaining agreement on August 5, 2003, and Robbins consulted his brother Dean, the Respondent's co-president and owner, before signing the short-form agreement. Therefore, the Respondent had ample opportunity to review the document before signing it and faxing it to the Union the next day.

The dissent contends that the Respondent has shown excusable ignorance of the terms of the agreement it signed because Doug Robbins "exercised prudence" and asked Styles about the nature of the documents. The dissent also relies on the fact that the short-form document did not, on its face, state that the Respondent would be bound to a union contract on any job in New Jersey. However, the short-form agreement, which Robbins read, clearly incorporated the full agreement which unambiguously was not limited to the Burlington project. A party's ignorance is not excusable unless the party was impeded in its ability to ascertain the contents of the agreement. See *Allied Fence*, supra, 922 F.Supp. at 1259 (excusable ignorance not established where union's alleged misrepresentation of agreement did not undermine the employer's ability to ascertain the true nature of the document). Here, even if the Union misrepresented the contents of the agreement, there is no evidence that the Respondent was impeded in its ability to read the entire contents of the agreement before signing. Had it done so, it would have ascertained the scope of the agreement that it was signing. Accordingly, the "excusable ignorance" standard has not been met here, and a finding of "fraud in the execution" is not warranted.[9] See *Positive Electrical Enterprises*, supra, 345 NLRB No. 67, slip op. at 8 (no "fraud in the execution" found where employer had the opportunity to read the letters of assent); *Laborers' Pension Fund v. A & C Environmental, Inc*., supra, 301 F.3d at 780–781 ("fraud in the execution" defense not established where employer had opportunity to read the contract).

For these reasons, we adopt the judge's finding that the Respondent has not established its "fraud in the execution" defense.[10] Nor do we find merit in any of the other defenses raised by the Respondent. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to apply the collective-bargaining agreement to its Trenton and Newark, New Jersey jobsites.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Horizon Group of New England, Albany, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(a) and (b) and reletter the subsequent paragraph.

"(a) Failing and refusing to bargain collectively and in good faith with Southern New Jersey Laborers District Council and Laborers Local Union No. 1153, as the limited exclusive collective-bargaining representative of the employees in the unit set forth below, by repudiating and refusing to adhere to the collective-bargaining agreement between the Building Laborers' District Councils and Local Unions of the State of New Jersey and the Building, Site and General Construction Contractors and Employers, effective May 1, 2002, to April 30, 2007, as required by the short-form agreement:

> All employees employed by the Respondent who are engaged in performing laborers' work as defined in the 2002–2007 Building, Site and General Construction Agreement on all jobs in the State of New Jersey."

2. Substitute the following for paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Make whole the unit employees for any loss of earnings and other benefits they may have suffered as a

[9] The dissent asserts that because the Union's request to sign was accompanied by a "threat of economic harm" the Respondent should be excused from its obligation to read the documents. The Respondent here was not under duress. There was nothing unlawful about the Union's informing the Respondent of the possible consequences of a failure to sign. Furthermore, there was no exigency in the situation. To the contrary, Styles left the documents with Doug Robbins and did not pressure him to make an immediate decision. Robbins had plenty of opportunity to read the documents and confer with his brother or with anyone else he may have wished to consult before deciding whether to sign. The fact that an "economic" threat may have been a factor in persuading the Respondent to sign does not absolve the Respondent of its responsibility to "take the time to read" the documents before deciding whether to sign.

[10] Because we agree with the judge that no "fraud in the execution" occurred in this case, we find it unnecessary to resolve whether, as contended by the dissent, parol evidence is admissible under Board law to prove that defense. Compare *NDK Corp*., 278 NLRB 1035, 1041 (1986) with *Positive Electrical Enterprises*, 345 NLRB No. 67, slip op. at 8 (2005). Assuming arguendo that parol evidence is admissible, we find, as set forth above, that "fraud in the execution" has not been established.

result of the refusal to comply with the collective-bargaining agreement, with interest, as set forth in the remedy section of the judge's decision.

(c) Make all contractually required benefit fund contributions, if any, that have not been made on behalf of unit employees, and reimburse unit employees for any expenses ensuing from its failure to make the required payments, in the manner set forth in the remedy section of the judge's decision."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 31, 2006

_____
Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting.

Contrary to the majority, I find that the Union misrepresented the essential terms of the short-form agreement, that the Respondent reasonably relied on this misrepresentation, and that the Respondent's signature on the short-form agreement was procured through fraud in the execution. Accordingly, I dissent.[1]

The facts are not in dispute. The Respondent successfully bid to perform renovation work on schools in Burlington, New Jersey. The project was covered by a Project Labor Agreement (PLA), which required the Respondent to use union labor on that site.

On August 5, Carl Styles, an agent of the Union, requested that the Respondent put some of the Union's men to work at the Burlington school jobsite. Doug Robbins, the Respondent's on-site project manager, agreed. Styles also presented Robbins with a copy of the Union's statewide collective-bargaining agreement and a short-form agreement. The short-form agreement bound the signer to the statewide agreement. When Robbins asked what the documents were, Styles told him they were "part of the Project Labor Agreement." That statement was not true. In fact, the short-form agreement went well beyond the project-specific PLA. Instead, it bound signatory employers to the multiyear, statewide, collective-bargaining agreement. Styles then threatened Robbins that if Robbins did not sign, the Union would cause "trouble" and the Respondent would not have enough labor to finish the project.

Doug Robbins had never dealt with a union before. He called his brother, Dean Robbins, co-president and co-owner, at the company's headquarters in Albany, New York. Doug told Dean what Styles had said. Dean told Doug to sign. Doug signed the Agreement. The Respondent continued working on the project into September 2003.

Afterwards, in January 2004, and in June 2004, the Respondent performed work at other schools in Trenton and Newark, respectively. Each time, the Union demanded that the Respondent operate under the terms and conditions of the statewide collective-bargaining agreement. When the Respondent refused, the Union filed the charge in the instant case.

"Fraud in the execution causes a party to believe that the agreement it signs has essential terms different from those that actually appear in the contract." *Electrical Workers Local 58 Pension Trust Fund v. Gary's Electric Service Co.*, 227 F.3d 646, 656 (6th Cir. 2000), citing *Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 32 (2d Cir. 1997). A finding of fraud in the execution renders a contract void. *Positive Electrical Enterprises*, 345 NLRB No. 62, slip op. at 8 (2005), citing *Iron Workers Local 25 Pension Fund v. Allied Fence and Security Systems*, 922 F.Supp. 1250, 1259 (E.D. Mich. 1996). Here, I find that the Union misrepresented to the Respondent the essential terms of the short-form agreement, on which the Respondent reasonably relied, and thus the Respondent is not bound to its terms.

When Styles offered the short-form agreement to Doug Robbins to sign, he clearly told Robbins that it was "part of the Project Labor Agreement." This was untrue, which Styles well knew. The project labor agreement, by its name and by its terms, is confined to the particular project and it is for the duration of the project. The short-form agreement is not confined in time or in scope. Robbins, in consultation with his brother Dean, knew only that the Respondent was being asked to sign a contract for the project. As a result, Doug Robbins, who had no experience dealing with a union, reasonably believed that the short-form agreement was simply compliance with the PLA. By contrast, the short-form agreement binds the Respondent to the Union's collective-bargaining agreement over a multiyear period, on any job in the state. Thus, the essential terms of the short-form agreement are far different than those of the PLA. Accordingly, through the act of Styles' falsely telling Doug Robbins that the short-form agreement "was part of the Project Labor Agreement," the Union committed fraud in the execution, and the contract is void.

[1] Contrary to the judge, parol evidence is admissible to prove the defense of fraud, and is not barred by the parol evidence rule. See *Positive Electrical Enterprises*, 345 NLRB No. 67 (2005) (examining parol evidence to determine that there was no fraud in the execution); see also E. Allan Farnsworth, Contracts § 7.4, at 442 (3d ed. 1999).

The majority finds that the Union's deliberate misrepresentation was not fraud in the execution for three reasons. First, the majority finds that the Respondent did not rely on the misrepresentation, but rather on the Union's threat that no workers would be sent to the jobsite unless the Respondent signed. I disagree. It would be one thing for the Respondent to sign a PLA under threat of economic force. It would be quite another for the Respondent to sign a much broader agreement under threat of economic force. In light of this, Robbins asked if it was the former situation, and the Union assured him that it was. On that basis, the agreement was signed. In sum, there was no reason for Styles to misrepresent the nature of the short-form agreement other than to get Doug Robbins to sign it. Styles obviously knew that if he told Robbins that the agreement was part of the PLA, the Respondent's assent would be secured. The fact that Dean Robbins feared being "in default of the PLA" only underscores the Respondent's concern that the PLA was all that mattered.

The majority misses the point in this respect. I agree that the threat of a work stoppage was a motivating factor in signing the agreement. However, it is one thing for an employer to conclude that signing an agreement to cover a project is a reasonable way to avoid a work stoppage. It is quite another thing for an employer to conclude that signing a much broader agreement is a reasonable way to avoid a work stoppage. An employer may decide that the latter is too high a price to pay. The Respondent here was misled to believe that only the former agreement was being sought. While the majority calls this speculation on my part, it is a fact that the Union misrepresented the scope of the agreement, and it is reasonable to infer that the Union knew that the Respondent's signature would be more easily obtained if the Respondent were told that the agreement was for the project.

Second, the majority states that the Respondent's attempted termination of the agreement at the end of the project shows that the Respondent "knew" that it was bound to the statewide agreement.[2] I disagree. To begin, the issue is not what the Respondent knew at the end of the project. The issue is what the Respondent knew at the time that it was asked to sign the contract. Further, the Respondent's attempted termination establishes only that the Respondent "knew" that it no longer needed any more workers because the project was over. It is pure speculation to say that the attempted termination meant that the Respondent "knew" that it had bound itself to the statewide agreement. The majority asserts that the termination was consistent with knowledge of the statewide agreement, but it is more consistent with the fact that the Respondent believed it had signed a project labor agreement, and the project was over.

The majority says that the best evidence of the contract's coverage is the contract itself. The majority again misses the point. The issue is whether fraud was used to obtain a signature on the contract. As noted above, parol evidence can be used to show that fraud.[3]

Third, the majority finds that even if the Respondent did not know what it was signing, its ignorance was not excusable because it should have known. I disagree. Robbins asked Styles as to the nature of the documents that Styles was forwarding, Styles replied that they were "part of the Project Labor Agreement." Dean and Doug Robbins were admittedly concerned about complying with the PLA. The PLA certainly does not bind the Respondent to use Union labor on any project in New Jersey other than the Burlington project, nor—on its face-does the short-form agreement. Thus, the only document that the Respondent signed, did not state that the Respondent would be bound to a Union contract on any job it performed in New Jersey. Furthermore, Doug Robbins had never dealt with a Union before, and relied to his detriment on the misrepresentation of Styles about the nature of the short-form agreement.[4]

[2] The majority does not rely on the negative inference drawn by the judge from the failure of Dean Robbins to testify.

[3] *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984) is illustrative. In that case, a contractor wished to sign forms to become a union member as an owner-operator in order to operate his bulldozer on a union job. Rather than filling out the relevant paperwork, the union gave him a copy of a short-form agreement, which the union agent said were just "standard forms." The contractor, relying on the representation that the documents were the standard forms to sign in his situation, signed without reading. The court found that a valid contract had never been formed. "[H]e who signs a document reasonably believing it is something quite different than it is cannot be bound to the terms of the document." Id. at 1504. Although the contractor in *Gilliam* did not receive a copy of the short form and master labor agreements, as here, the misrepresentation about what he was signing was very similar. Notably, the judge found excusable ignorance in *Gilliam* despite the absence of the threat of economic harm. See *Iron Workers Local 25 Pension Fund v. Allied Fence and Security Systems*, 922 F. Supp 1250, 1259 (E.D. Mich. 1966), infra.

[4] Unlike the contractor in *Iron Workers Local 25 Pension Fund v. Allied Fence and Security Systems*, 922 F.Supp. 1250, 1259 (E.D. Mich. 1996), cited by the majority, the Respondent was faced with a demand to sign combined with a threat of economic harm. As noted above, that threat was a factor in persuading the Respondent to sign what it was told was a project agreement. Faced with that threat, and being told that the contract was confined, it is not surprising that the Respondent did not take the time to read all the terms of a number of complex and long collective-bargaining agreements. Contrary to the majority, I am not suggesting that the Respondent has established the defense of duress, but rather that the Respondent's ignorance was excusable. Cf. *Allied Fence*, 922 F.Supp. at 1259 (finding no fraud in the execution, noting that the employer was under no union pressure to sign the document).

I recognize my colleagues' concern that it is important to read contracts before signing them. However, it is even more important that parties not lie about the nature of the document they are proffering. It is clear that the Respondent relied upon the misrepresentation of Styles, and did not know the real scope of the document that it signed.[5] The issue is whether that ignorance was excusable.[6] In my view, the answer is in the affirmative. The Respondent was prepared to be bound to the PLA, because that was the requirement for that site. The Respondent exercised prudence in asking the question of whether the proffered agreements were simply part of the PLA. The Union responded falsely in order to induce a signature. In these circumstances, I would excuse the Respondent's ignorance.

I find that the contract was procured through fraud in the execution and thus is not binding on the Respondent. Accordingly, I would dismiss the complaint.

Dated, Washington, D.C. July 31, 2006

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Southern New Jersey Laborers District Council and Laborers Local Union No. 1153, as the limited exclusive collective-bargaining representative of the employees in the unit set forth below, by repudiating and refusing to adhere to the collective-bargaining agreement between the Building Laborers' District Councils and Local Unions of the State of New Jersey and the Building, Site and General Construction Contractors and Employers, effective May 1, 2002, to April 30, 2007, as required by the short-form agreement:

> All employees employed by us who are engaged in performing laborers' work as defined in the 2002–2007 Building, Site and General Construction Agreement on all jobs in the State of New Jersey.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL comply with the terms of the collective-bargaining agreement between the Building Laborers' District Councils and Local Unions of the State of New Jersey and the Building, Site and General Construction Contractors and Employers, effective May 1, 2002, to April 30, 2007, and any automatic renewal or extension of it, including by paying contractually required wages and fringe benefits.

WE WILL make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of our refusal to comply with the collective-bargaining agreement, with interest.

WE WILL make all contractually required benefit fund contributions, if any, that have not been made on behalf of unit employees, and WE WILL reimburse unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL offer immediate and full employment to those applicants who would have been referred by the Union to us for employment at our Trenton and Newark, New Jersey job sites, were it not for our unlawful conduct, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of our failure to hire them, plus interest.

HORIZON GROUP OF NEW ENGLAND

Brian Monroe, Esq., for the General Counsel.
Steven Weinstein, Esq. (Becker Meisel, LLC), of Livingston, New Jersey, for the Respondent.
Michael Scaraggi, Esq., of West Caldwell, New Jersey, for the Charging Party Local 1153.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by Southern New Jersey Laborers District Council (the District Council) and by Laborers Local Union No. 1153 (Local 1153 and collectively called the Union), the Director for Region 22 issued an order consolidating cases, consolidated

[5] Compare *Positive Electrical Enterprises*, 345 NLRB No. 67 (2005), where the judge discredited the employer-agent's testimony that he did not know what he was signing.

[6] *Allied Fence*, supra at 1259.

amended complaint, and notice of hearing, on September 30, 2004, alleging that Horizon Group of New England (Respondent) has violated Section 8(a)(1) and (5) of the Act, by failing to apply the terms and conditions of its collective-bargaining agreement with the Union, to jobsites in Trenton and Newark, New Jersey.

The trial with respect to the allegations in said complaint was held before me in Newark, New Jersey, on March 2, 2005. Briefs have been filed by the General Counsel and the Respondent, and have been carefully considered.

Based upon the entire record, including my observations of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with its primary office and place of business in Albany, New York, has been engaged as a contractor in the construction industry providing labor and demolition services at various worksites throughout New Jersey, including worksites in Trenton and Newark, New Jersey. During the preceding 12 months from the date of the complaint, Respondent performed services valued in excess of $50,000 in states other than the State of New Jersey. It is admitted and I so find that all times material herein Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find that the District Council and Local 1153 are and have been labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS

Respondent as noted performs commercial construction at various jobsites, with its main office in Albany, New York. Its copresidents and only officers are Dean Robbins and Michael Dawson.

Doug Robbins is the brother of Dean Robbins. Doug Robbins is a project manager for Respondent and has been employed in that position for 4 years. He was the project manager on 10–11 projects, which ranged in cost from $100,000 to 6.7 million dollars. As project manager, Robbins sets up the project, hires subcontractors, hires employees, signs subcontractor agreements, buys materials, signs invoices, and represents Respondent at meetings. Various individuals employed by Respondent on the job, such as head superintendent and foreman report to Doug Robbins as project manager. Doug Robbins sends daily reports to Respondent's main office in Albany, New York, generally to his brother. In that fashion Dean Robbins monitors the projects of Respondent. The owners of Respondent Dean Robbins and Dawson, are rarely present on Respondent's projects, so that the project manager is the face of Respondent at the projects that he is in charge of.

In that regard, testimony was adduced from Doug Robbins as well as Dawson, that the project managers including Doug Robbins, have authority only with regard to the particular project that they are working on, and have no authority to execute any document that seeks to bind Respondent beyond that project, including collective-bargaining agreements. Further Doug Robbins testified that documents that he does sign on behalf of Respondent, such as subcontractor agreements, must be approved by Respondent's officials in Albany, prior to Doug Robbins signing the document.

In July of 2003, Respondent was the successful bidder on a project involving renovation work on three schools in Burlington, New Jersey. The project was funded by the New Jersey School Construction Company (NJSCC), a subdivision of New Jersey Economic Development Authority.

Because the project exceeded five million dollars, it was covered by the Project Labor Agreement (PLA) negotiated between NJSCC and various trades unions, including the Laborers Union. The PLA required that the contractor use labor on the project referred by the various unions, and to be bound by the various collective-bargaining agreements, including benefit fund contributions, for work performed on the project.

During the bidding process, Respondent was made aware that the project was covered by the PLA, and that by entering into a contract for the project, it would be bound by the provisions of the PLA. The PLA itself, which was signed by the NJSCC and representatives from the various unions, also included as attachments, the collective-bargaining agreements between the unions and various associations, that the contractors on the job would be required to follow while performing work on the project. The PLA also contains in Section 4, a "Supremacy Clause," which reads as follows:

> This Agreement, together with the local Collective Bargaining Agreements appended hereto as Schedule A represents the complete understanding of all signatories and supersedes any national agreement, local agreement or other collective bargaining agreement of any type which would otherwise apply to this Project, in whole or in part. Where a subject covered by the provisions, explicit or implicit, of this Agreement is also covered by a Schedule A, the provisions of this Agreement shall prevail. It is further understood that neither the PMF nor any Contractor shall be required to sign any other agreement as a condition of performing work on this Project. No practice, understanding or agreement between a Contractor and Local Union, which is not explicitly set forth in this Agreement shall be binding on this Project unless endorsed in writing by the PMF.

The project was valued at $6.7 million Respondent performed approximately 10 percent of the labor with its employees. The remainder of the work was subcontracted out by Respondent to various contractors, whose employees were also subject to PLA. Respondent did not have a collective-bargaining agreement with any labor organization, and none of its employees were represented by any union. Respondent had a work force of its own employees of approximately 15–20 employees.

Respondent commenced work on the job on or about July 7, 2003. It began performing demolition work with its own employees. Doug Robbins testified that this job was his first experience with a labor union or a PLA. He claims that he was under the impression that the PLA allows Respondent to use 5 percent of its own employees for each trade. However, it does

not appear that the PLA provides any such exception, and Respondent has not so shown.

On July 23, 2003, a meeting was held at I.B.E.W. hall in Trenton, New Jersey. Present were representatives from all the building trades unions, representatives from the NJSCC, and Doug Robbins. An official from the NJSCC announced that Respondent was the successful bidder on the Burlington job and introduced Robbins as the "key person" for Respondent on the job. The union representatives were told that if any questions arise on the job, Robbins should be contacted.

Robbins gave a brief description of the scope of the work on the job and types of trades that would be utilized. After Robbins completed his presentation, a number of business agents approached Robbins, including Carl Styles of the District Council, gave Robbins their business cards, and asked Robbins to call them if he needed workers.

Morris Rubino, president of the Building Trades Council, spoke and stated that the project was covered by the PLA, and added that the contractors do not have to sign individual contracts with any union. However, Rubino added that the unions can approach any contractor, "but they do not have to sign." Rubino also went over the terms of the PLA at the meeting.

Robbins testified that he expected, based on conversations with representatives from the NJSCC to be asked to sign the PLA at the meeting, but that did not happen. Robbins further testified that after the meeting he discussed the issue with these representatives, as well as his brother, and was told "don't worry about it." In fact it is not clear whether Respondent ever actually signed the PLA. However, Robbins concedes that he was aware based on the bidding process, that Respondent was obligated to the PLA and to use union labor on the project.

On August 5, 2003, Carl Styles, accompanied by Leon Jones, a business agent for the Bricklayers Union visited the Burlington jobsite and met with Doug Robbins in the jobsite trailer. Styles introduced himself to Robbins again,[1] and informed Robbins that he noticed that Respondent was performing demolition work, that is within the Laborer's Union jurisdiction. Therefore, Styles wanted to put some of his men to work. Robbins replied that he was more than happy to hire some of Styles' people, since he knew that Respondent was bound by the PLA. Styles asked how many workers Respondent would need? Robbins answered "From 8–10 workers." Styles then handed Robbins a copy of a document entitled "Short Form Agreement," plus a copy of the Union's collective-bargaining agreement with the Building Site and Construction Contractors and Employers Association. Robbins asked Styles what these documents were for. Styles replied "That in order for Respondent to get men to work, Robbins needed to sign the Short Form Agreement." Robbins read the short-form agreement and asked if it was part of the PLA? Styles answered "That it was part of the PLA." Robbins read it again and appeared to be skeptical of Styles' description of the document, since it made no reference to the PLA. The document reads as follows:

> The undersigned Employer, desiring to employ laborers from the New Jersey Building Laborer Local Unions and District Councils affiliated with the Laborers' International Union of North America, hereinafter the "Union," and being further desirous of building, developing and maintaining a harmonious working relationship between the undersigned Employer and the said Unions in which the rights of both parties are recognized and respected, and the work accomplished with the efficiency, economy and quality that is necessary in order to expand the work opportunities of both parties, and the Unions desiring to fulfill the undersigned Employer's requirements for construction craft laborers, the undersigned Employer and Unions hereby agree to be bound by the terms and conditions as set forth in the 2002-[20]07 Building, Site and General Construction Agreement, which Agreement is Incorporated herein as it set forth in full.

Styles then stated if Respondent didn't sign the agreement, it would not receive any men from the Union, and the Union would cause trouble for Respondent on the job with the school district and the NJSCC, because Respondent is not abiding by the PLA. Robbins told Styles to "Leave your package on the table and I'll get back to you." Styles left the short-form agreement and the contract on the table and left the trailer.

The next day, August 6, 2003, Styles received a phone call from his Manager Kurt Jenkins. Jenkins informed Styles that the Union had received a signed copy of the short-form agreement from Respondent by FAX. The agreement was signed by Doug Robbins, and dated August 5, 2003. Styles signed a copy of the agreement on August 6, 2003, but did not send a copy with his signature on it to Respondent.

My findings with respect to events of August 5 and 6 is based on a compilation of what I believe to be the credible portions of the testimony of Doug Robbins, Styles, and Jones. While Styles and Jones testified that the conversation between Styles and Robbins lasted from 5–10 minutes, the only portions that they recalled was Robbins instructing Styles to leave the package on the table. Jones conceded that there may have been more to the conversation than he recounted. I therefore conclude that there was more to the conversation than testified to by Styles and Jones, and I credit Robbins as detailed above that Styles told him that the short-form agreement was part of the PLA, and threatened to withhold workers from Respondent and to cause trouble for Respondent on the job with the District and NJSCC, if Respondent did not sign.

However, I credit Styles and Jones, that Robbins did not sign the short-form agreement on August 5, but instead faxed a copy to the Union the next day. I note that Styles was corroborated by Jones as to this testimony. Further based on the testimony of Robbins as well as Dawson, concerning Robbins' limited authority, I find it unlikely that he would sign anything on behalf of Respondent involving Union's without approval from one of the officers, i.e., his brother or Dawson. I note particularly that Doug Robbins testified that he had no previous experience dealing with unions on any of the previous jobs, where he served as project manager. This fact makes it more likely that he would consult with his superiors, before signing any documents on behalf of Respondent with the Union. I conclude therefore, as related above that the Union received a signed copy of the short-form agreement by FAX on August 6, 2003,

[1] Styles had previously met and gave Robbins his card at the July 23, 2003 meeting.

which was signed by Robbins on August 5, after he consulted with his brother. I also do not credit Doug Robbins' testimony that Styles informed him that the short-form agreement was only a one-job agreement. I credit Styles' testimony that he had no authority to sign one-job agreements. I also rely upon the testimony of Respondent's own witness, Michael Dawson. He testified that he spoke to Dean Robbins about the issue and was told as follows:

> My conversation with Dean was exactly that Doug was looking to put Laborers on the project, was told by Mr. Styles that if he didn't sign the agreement he would not bring the Laborers to the project and we would be in default of the PLA, which was there. So Doug signed this agreement under coercion or fear that he couldn't do the project. This is what I understand.

Notably Dawson did not mention anything about Respondent being informed, or believing that the short-form agreement was a one job agreement, when it signed, but only that Robbins signed under "coercion or fear that he couldn't do the project." I find therefore, that Doug Robbins consulted his brother Dean. Dean after reading the documents, which are clear on their face, was aware that Respondent was signing a contract with the Union, covering more than the Burlington jobsite. However, because of the threat that the Union would not send any men and to cause trouble for Respondent, Robbins decided not to jeopardize a $6.7 million dollar contract, and agreed to sign.

I also rely on Respondent's subsequent conduct, to be discussed more fully below, when it attempted to terminate the contract, when it finished with the Laborers' work at the project. Thus if Respondent truly believed that it had signed a one-job agreement, there would be no need to terminate the agreement with the Union.

Finally, I also rely on the failure of Respondent to call Dean Robbins as a witness. Doug Robbins admitted that he discussed the matter with his brother, and sent him a copy of the short-form agreement that he signed. I find that Respondent's failure to call Dean Robbins to testify permits an adverse inference, which I draw that his testimony would have been unfavorable to Respondent concerning these issues. *Wild Oats Markets*, 344 NLRB No. 86, ALJD Slip op. p. 31 (2005); *Meyers Transport*, 338 NLRB 958, 972 (2003); *United Parcel Service*, 321 NLRB 300, 308–309 fn. 1 (1996); *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

The collective-bargaining agreement that is referred to in the short-form agreement, which I have found was provided to Robbins by Styles on August 5, 2003 sets forth recognition and territorial jurisdiction clauses, as follows:

> The Employer recognizes that the Building and Construction District Councils and Local Unions bound hereby represent a majority of employees of the Employer doing laborer's work and shall be the sole bargaining representatives with the Employer for all employees employed by the Employer engaged in all work of any description set forth under Article II, Section 2.10, Work Jurisdiction, below. The District Councils and Laborer Local Unions hereby are: Northern New Jersey Building Laborers District Council (Locals 592, 325 and 1153); Central New Jersey Building Laborers District Council (Locals 394, 593 and 1030) and the Southern New Jersey Building Laborers District Council (Locals 222, 415 and 595).

Article II: "Work and Territorial Jurisdiction" Section 2.30 territorial jurisdiction, in part reads:

> This Agreement is effective and binding on all jobs in the State of New Jersey upon execution of the same by the Employer and any building and construction laborer local union bound hereby. . . .

Furthermore, Article 1, Section 1.30, entitled "Scope of Agreement," reads as follows:

> The relationship of the parties is fully and exclusively set forth by this Agreement and by no other means, oral or written.

The agreement also provided in bold face in the original;

> *Note: This Agreement may not be limited to a Job Only Agreement without the written approval of the District Council Business Manager.*

From approximately August 7, 2003 to September of 2003, Respondent employed Laborers at the Burlington job site.[2] On September 12, 2003, Doug Robbins faxed the Union a letter of termination. According to Doug Robbins, prior to drafting the letter, he was told by one of his fellow project managers that he should have somebody look at whatever information they had in the office to see if there is anything there to get Respondent out of the agreement or whatever he signed.

> *"RE: Terminating Labor Agreement"*
>
> Horizon Group would like to thank you for supplying us with manpower for the Burlington City Schools-NJSCC project. It was most helpful in getting the work completed on time. Due to the fact we won't need any more laborers and hereby terminate contract as per Article XXIII: Agreement & Termination 23.10.
>
> Once again thank you for your cooperation and help on this project."

The termination section referred to by Respondent in its letter, Section 23.10 of the collective-bargaining agreement provides:

> *Article XXIII: Agreement and Termination*
>
> *23.10 Effective Date and Termination*
>
> This Agreement shall become effective on the 1st day of May 2002, or the date signed, whichever is later, and shall terminate at midnight, April 30, 2007. It is mutually agreed, however, that if any Employer signatory to this Agreement desires to reopen negotiations for a new Agreement to take effect upon the termination of this Agreement that such Employer shall give written notice to the Laborers' International Union of North America, Eastern Region office, of such intention ninety (90) days prior to the termination of this Agreement,

[2] During this period of time, Respondent complied with all the terms of the collective-bargaining agreement with respect to its employees working on the project.

> otherwise this Agreement is to continue in full force and effect after the termination date of this Agreement from year-to-year, until written notice is given of a desire to reopen negations. In order for this Agreement to be terminated after the aforesaid termination date, the Employer shall give written notice at least thirty (30) days prior to April 30th of each succeeding year and, if said thirty (30) days notice is given, the Agreement shall terminate on April 30th of the year following the giving of such notice. In the case of such continuation, the Employer agrees to be bound by the wage and benefit rate schedules of any new Agreement made by the Union and the Building Contractors Association of New Jersey.

The Union did not send a response to Respondent's letter. Although the "laborers" work that Respondent was performing at the site was completed in September of 2003, other aspects of the project and work by subcontractors continued for many months.

In January of 2004, Respondent began performing the work at the Columbus School in Trenton, New Jersey. This project was not covered by NJSCC PLA. However, the Laborers' Union made a demand that Respondent comply with the Laborers' contract, based upon the short-form agreement that Respondent signed in August of 2003. Respondent did not comply with the demand, and did not apply the contract to the work on that project. Instead, Doug Robbins called Styles on the phone in early January of 2004. Robbins asked Styles to do him a favor and call the local Union in Trenton and tell them that the document that Respondent had signed was for the Burlington's site only, and "get them off our backs." Styles replied that the Agreement signed by Respondent was a full blown labor agreement covering Laborers throughout the State of New Jersey. Styles added that he does not have the power to sign a contractor to a one-job agreement. Styles received another call from someone else from Respondent, whose name Styles could not recall. This individual made a similar request of Styles, to do him a favor and tell Styles' people in Trenton that Respondent signed a one-job agreement. Again Styles replied that Respondent had signed a full blown agreement with the Union and he did not have the authority to sign a one-job agreement.

In June of 2004, Respondent obtained another contract to perform work at the First Avenue School in Newark, New Jersey. Local 1153 demanded arbitration under the Laborers contract, claiming that Respondent had violated the contract by performing work "nonunion" and subcontracting work to a nonsignatory contractor. Subsequently, the instant charges were filed. Thus it does not appear that the arbitration demand went any further. Apparently, the Union decided to proceed with the Board charge, and made no further attempts to pursue its case through the arbitration process.

III. ANALYSIS

There can be no dispute that Respondent executed the short-form agreement dated August 5, 2003, which by its terms, expressly bound Respondent to the terms of a collective-bargaining agreement, which obligated Respondent to apply the terms of said contract to all jobs of Respondent in the State of New Jersey. It is also undisputed, that subsequent to the signing, and still during the term of the agreement, Respondent performed work on jobs in Trenton and Newark, New Jersey, and failed to apply the terms of the contract to the laborers' work performed on these projects.

The complaint alleges and General Counsel contends that Respondent's failure to do so, violated Section 8(a)(1) and (5) of the Act.

Respondent disagrees and has raised various defenses to the complaint allegations. Initially, Respondent contends that Doug Robbins who executed the short-form agreement on behalf of Respondent, had no authority to bind Respondent to any collective-bargaining agreement, outside of the project that he was responsible for monitoring, i.e., the Burlington project. *International Operating Engineers, Local 520 (Home Building Contractors)*, 168 NLRB 256, 258 (1967). (Foreman did not have implied authority to bind Employer to collective-bargaining agreement for 2 years within broad geographical area).

The applicable law with respect to agency and implied authority was summed up by the Fifth Circuit Court of Appeals.

> As to agency, [S]ection 2(13) of the NLRA provides that "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. § 152(13). An employer's responsibility for the acts of an agent is determined in accordance with the ordinary common law rules of agency. *See Overnite Transp. Co. v. NLRB,* 140 F.3d 259, 265–[2]66 (D.C. Cir. 1998). One of the primary indicia of agency is the apparent authority of the employee to act on behalf of the principal. See id., quoting Reinstatement (Second) of Agency § 27 (1992) ("'Apparent authority' exists where the principal engages in conduct that 'reasonably interpreted, causes the person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.'"). Stated otherwise, "[a] party claiming apparent authority of an agent must prove (1) that the acting party subjectively believed that the agent had authority to act for the principal and (2) that the subjective belief in the agent's authority was objectively reasonable." *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1073 [f]n. 2 (9th Cir. 2001).

Poly-America, Inc. v. NLRB, 260 F.3d 465, 480 (5th Cir. 2001); *Accord Zimmerman Plumbing*, 325 NLRB 106 (1997); *Great American Products*, 312 NLRB 962, 963 (1993).

Applying these principles to the instant case, it is clear that Respondent clothed Doug Robbins with apparent authority to execute the collective-bargaining agreement with the Union, that the Union believed that Robbins had the authority to act for Respondent, and that belief was objectionively reasonable. In that regard, Doug Robbins represented Respondent at the Building Trade meetings and was introduced as Respondent's chief spokesperson on the project. Robbins signed invoices and subcontracting agreements on behalf of Respondent and was otherwise in charge of the project. It was therefore reasonable for the Union to believe that Robbins was authorized to act for Respondent by signing the short-form agreement.

While Respondent introduced evidence that Doug Robbins' authority was limited to activities involving only the particular project he was in charge of, that limitation was never made known to the Union. Doug Robbins did not tell the Union that his authority was limited in any way, and there were no facts, unlike in *International Operating Engineers, Local 520*,[3] that would have put the Union on notice of such a limitation. See *Safeway Steel Products*, 333 NLRB 394, 400 (2001) (negotiator never informed Union that his authority was limited).

Furthermore, I have found above, that in fact, when Doug Robbins signed the short-form agreement, he had received approval from his brother Dean a co-owner of Respondent, to execute the agreement. Such express approval obviously is sufficient to overcome any lack of authority by Doug Robbins to bind Respondent to the agreement. *Safeway Steel*, supra.

Additionally, even absent my finding of express approval by Dean Robbins, it is undisputed that Dean Robbins was aware that Doug Robbins had signed the agreement, and did nothing to disavow it or to indicate to the Union that Doug was not authorized to execute the document. *Opportunity Homes, Inc.*, 315 NLRB 1210, 1217 (1994) (board of directors never notified the Union that the administrator did not have the authority to recognize the Union); *Pentech Corp.*, 294 NLRB 924, 926 (1989) (failure of employer to disavow conduct of alleged agent).

Accordingly based on the foregoing, I conclude that Doug Robbins had both the express and implied authority to execute the short-form agreement with the Union on behalf of Respondent. *Safeway Steel*, supra; *Zimmerman Plumbing*, supra; *Opportunity Homes*, supra; *Great American Products*, supra.

Respondent also argues that General Counsel failed to provide any evidence that an appropriate unit existed or that the Union represented a majority of employees at any time. With respect to the unit, although the short-form agreement does not mention the unit, it does make reference to the 2002–2007 building site and general construction agreement, which agreement "is incorporated herein as if set forth in full." That collective-bargaining agreement with the Laborers' District Council and its various affiliate locals, sets forth the unit as employees performing laborers' work as defined in the contract, "on all jobs in the State of New Jersey."

Such a unit which had been agreed to by the parties, by virtue of Respondent having signed the short-form agreement, is presumptively appropriate, and no evidence was presented that such a unit is inappropriate. I therefore find that the unit in the contract is appropriate. *Gem Management Co.*, 339 NLRB 489, 502 (2003) (unit of all jobsites in certain counties of Michigan); *National Roof Systems*, 305 NLRB 965, 970 fn. 11 (1991).

While Respondent is correct that the General Counsel has not established that the Union has at any time represented a majority of its employees, such a finding is of no help to Respondent. The complaint alleges a "limited" 9(a) relationship between Respondent and the Unions, which does not require majority status, since Respondent is admittedly an employer in the construction industry. In *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub. nom. 843 F.2d 770 (3d Cir. 1988) cert. denied, 488 U.S. 889 (1988), the Board recognized that prehire authorized agreements under Section 8(f) of the Act, executed by Employers in the construction industry, are lawful regardless of majority status. When an Employer signs such an agreement, the Employer violates Section 8(a)(1) and (5) of the Act by failing to adhere to or by repudiating such agreements during its term. *Gem Management*, supra at 501; *Cedar Valley Corp.*, 302 NLRB 823 (1991); *National Roof Systems*, supra at 970; *Mesa-Verde Construction Co. v. Laborers*, 861 F.2d 1124, 1136 (9th Cir. 1988).

I therefore reject Respondent's contention that the lack of proof of majority status of the Union, provides a defense to Respondent's conduct.

Respondent's primary defense to its obligation to adhere to the Laborers' contract, is that it was procured by "fraud in the execution." *Conners v. Fawn Mining Corp.*, 30 F.3d 483 (3d Cir. 1994); *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984). These circuit court cases do differentiate between fraud in the execution and fraud in the inducement, and did allow parties to collective-bargaining agreements to argue that the contract is void and unenforceable where the employer signs a document materially or radically different from the document that he believed he was signing, due to fraudulent statements by the Union. *Fawn Mining*, supra. (Union told Employer that the one-page signature document that it signed, would be attached to the collective-bargaining agreement, which did not require employer to pay into benefit funds), *Gilliam*, supra. (Union told Employer that he was signing an application to become a member of the Union as an owner-operator, rather than the short-form agreement.)

While both of these cases did involve collective-bargaining agreements, neither of them involved NLRB cases, and are inconsistent with NLRB law.

It is thus well settled under Board law, supported by the Courts, that where the contractual provisions are unambiguous, parol evidence is inadmissible to vary the terms of such an agreement. *Quality Building Contractors*, 342 NLRB 429, 430–431 (2004); *America Piles*, 333 NLRB 1118, 1119 (2001); *NDK Corp.*, 278 NLRB 1035 (1986); *NLRB v. Electrical Workers, Local 11*, 772 F.2d 571, 575 (9th Cir. 1985).

Here the document signed by Respondent is clear and unambiguous, and parol evidence may not be permitted to vary its terms. Thus even if the testimony of Doug Robbins was credited that he was told that he was signing a one-job agreement by Styles, this would not provide a defense to Respondent. *Quality Building*, supra; *American Piles*, supra. I did find however that Styles did misrepresent to Robbins that the document that he was signing on behalf of Respondent was part of the PLA, when it was not, but for the same reasons, and based on the same precedent, this statement cannot be used to vary the terms of the unambiguous agreement that Respondent signed.

[3] In *International Operating Engineers Local 520*, the foreman involved was dressed in working clothes, unlike Robbins here. Further the foreman told the Union that he could not hire without authorization from the home office. Thus since the Union had been so informed, the Board concluded that the Union had no reason to assume that the foreman had sufficient authority to sign a collective-bargaining agreement. Here Robbins made no such comments to the Union, indicating his limited authority.

Therefore, the parol evidence rule precludes Respondent's defense based on any alleged fraud in the execution.

Furthermore, whatever may be said about the difference between fraud in the execution and fraud in the inducement, I find that even under the court cases cited by Respondent, neither are present here. Both fraud in the execution and fraud in the inducement, require a finding that the Employer was in fact misled about what was being signed, and that the Employer relied on that misrepresentation when signing the document. That is not the situation here.

I have found that whatever alleged misrepresentations were made by the Union, Respondent signed the short-form agreement, not for these reasons, but because the Union threatened not to send it any men and threatened to make "trouble" for Respondent, if it did not sign. This finding is based upon Dawson's admission that Dean Robbins told him the reason why Respondent signed, as well as the absence of any testimony from Dean Robbins. The failure to call Dean Robbins to testify, gives rise to an adverse inference that his testimony would be adverse to Respondent on this issue. *Wild Oats*, supra; *International Automated Machines*, supra.

Further support for this conclusion is found in Respondent's own conduct of attempting to terminate the contract in September of 2003. If Respondent truly believed that it had only obligated itself to a one-job agreement, there would be no reason to attempt to terminate the agreement, when the Laborers' work ended on the job.

The above evidence leads me to conclude which I do, that Respondent having read the short-form agreement, knew full well, when it signed, that it obligated Respondent to apply the contract to all jobs in New Jersey. However, in order not to jeopardize a $6.7 million dollar contract, by virtue of the Union's threat to cause trouble on the job for it, if it did not sign, Respondent decided to sign, and then attempt to terminate the contract when the Laborers' portion of the job was complete. Clearly the attempt to terminate is ineffectual, since the section of the contract cited by Respondent does not allow termination in September of 2003.

Accordingly, based on the foregoing analysis and precedent, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Horizon Group of New England, Albany, New York, is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Southern New Jersey Laborers District Council and Laborers Local Union No. 1153, and collectively called the Union, are labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to adhere to or apply the terms of conditions of the 2002–2007 collective-bargaining agreement to its jobsites in Newark or Trenton, New Jersey, Respondent has repudiated its collective-bargaining agreement with the Union and has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action to effectuate the purposes and policies of the Act.

I shall recommend that Respondent be ordered to honor the terms of the collective-bargaining agreement that it executed with the Union, including offering employment to applicants, who would have been referred by the Union were it not for Respondent's conduct, *AEi2, LLC,* 343 NLRB No. 56, Slip op. p. 1 (2004); *J. E. Brown Electric*, 315 NLRB 620 (1994), make whole such applicants for any loss of earnings or benefits suffered by the Respondent's failure to hire them. Backpay is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Instatement and backpay issues will be resolved by a factual inquiry at the compliance stage of the proceeding. *AEi2, LLC*, supra.

Additionally, I shall recommend that Respondent be ordered to reimburse unit employees at the Trenton and Newark jobsites for any losses of wages and benefits, including payments to the Union's benefit funds, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970); *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Horizon Group of New England, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating the 2002–2007 collective-bargaining agreement that it executed with Building Laborers' District Council and local Unions of the State of New Jersey (the Union).

(b) Failing to adhere to the terms and provision of the 2002–2007 collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor the terms of the 2002–2007 contract with the Union during the term of the agreement and any automatic renewal or extension of it, including by paying contractually required wages and fringe benefits.

(b) Make whole, with interest, the unit employees for any loss of wages and other benefits they may have suffered as a result of Respondent's failure to adhere to the terms of the collective-bargaining agreement, as set forth in the remedy section of this decision.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Offer immediate and full employment to those applicants who would have been referred by the Union to Respondent for employment at its Trenton and Newark, New Jersey jobsites, were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by the Respondent's failure to hire them, plus interest as set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and other payments due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its current jobsites within the geographical area encompassed by the appropriate unit herein and at its facility in Albany, New York, Newark and Trenton, New Jersey jobsites, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 21, 2005

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT repudiate the terms and conditions of our collective-bargaining agreement with Building Laborers' District Council and local Unions of the State of New Jersey (the Union) AFL–CIO during the term of the agreement.

WE WILL NOT fail and refuse to recognize and abide by the terms of that agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor the terms of the 2002–2007 collective-bargaining agreement with the Union during the term of the agreement and any automatic renewal or extension of it, including paying contractually required wages and fringe benefits.

WE WILL make whole, with interest, all bargaining unit employees for any loss of wages and other benefits they may have suffered as a result of our failure to adhere to the terms of the collective-bargaining agreement.

WE WILL offer immediate and full employment to those applicants who would have been referred by the Union to us for employment at our Trenton and Newark, New Jersey jobsites, were it not for our unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by failure to hire them plus interest.

HORIZON GROUP OF NEW ENGLAND